

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-011746

03/14/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

JOSEPH R RIVKIN

CHRISTOPHER T RAPP

v.

ARIZONA STATE BANKING DEPARTMENT      CRAIG A RABY

OFFICE OF ADMINISTRATIVE  
HEARINGS

MINUTE ENTRY

**1. Standard of Review**

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.<sup>1</sup> The reviewing court may not substitute its own discretion for that

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<sup>1</sup> *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

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exercised by an administrative agency,<sup>2</sup> but must only determine if there is any competent evidence to sustain the decision.<sup>3</sup>

**2. FACTS**

On April 17, 1997, Plaintiff, Joseph Rivkin, submitted an Application for Mortgage Banker License to the Arizona State Banking Department (ASBD). The ASBD denied Rivkin's application on June 27, 1997, because ASBD found Rivkin not to be a person of good character. On October 21, 1997, Rivkin requested an administrative hearing. A hearing was granted and on January 18, 1998, the ASBD affirmed their denial of Rivkin's application. Although Rivkin has never had a license suspended or revoked in Arizona, the Department agreed to allow him not to renew the license rather than revoke it and then denied his application in 1997.

On August 30, 2001, Rivkin submitted a second Application for Mortgage Banker License to the ASBD. Rivkin answered "yes" to question 19(a) on the second application that asked:

19. State whether the applicant or any officer, director, partner or trustee of the applicant or responsible individual has:
- a. been convicted of any criminal offense other than a traffic violation.

As part of the second application process, Rivkin disclosed to the ASBD that he had a 1995 conviction for attempted sexual contact with a minor. The evidence of record established that on March 31, 1995, Rivkin was indicted by the Maricopa County Superior Court (Case No. CR9590943) on two counts of child molestation, five counts sexual conduct with a minor, and one count public sexual indecency to a minor. On July 12, 1995, Rivkin entered a plea agreement, in which he pled guilty to one count of attempted sexual conduct with a minor. On November 2, 1995, Rivkin was sentenced to a lifetime probation, a \$10,000 fine, and a year in the Maricopa County Jail. Rivkin complied with the terms of the sentence. Rivkin paid the fine, served between November 16, 1995 through November 15, 1996 in the Maricopa County jail, and was removed from sex offender probation to standard probation. When the second application for Mortgage Banker license was submitted to the ASBD, the Plaintiff was still on probation.

Mr. Rivkin filed a request for an administrative hearing on the denial of the second application. On February 21, 2002, Mr. Rivkin was granted early termination of probation. A

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<sup>2</sup> *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

<sup>3</sup> *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).

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hearing was held on April 3 and 19, 2002. The hearing officer heard witness testimony regarding Rivkin's past, as well as his progress over the course of approximately eight years.

The events that led to Rivkin's conviction are as follows: on September 24, 1994, Rivkin and his girlfriend had dinner at a local restaurant with a friend and his family, including the friend's 14 year old daughter. After dinner, they all went to Rivkin's home. While at Rivkin's home, Rivkin and the 14 year old girl shared a "passionate kiss" in the kitchen which "excited" Mr. Rivkin. When the girl was interviewed she reported that Rivkin was a friend of the family whom she had known for approximately one month.

The 14 year old was spending the night at Rivkin's home to baby-sit her younger sister who was there spending the night with Rivkin's six (6) year old daughter. After the children had gone to bed and the guests had departed, Rivkin went to the bedroom of the 14 year old and proceeded to engage in various sexual acts with her.

When Rivkin testified that when he was a teenager he was diagnosed with bipolar disorder. Currently, he takes prescribed medication (i.e., Depakote, Wellburtir, Ludiomel, and Desyrel) for his disorder. Rivkin testified that he was addicted to cocaine for three years prior to the commission of the crime and painkillers when he was arrested in 1994. And he conceded that he lacked good character at the time of his arrest. In 1994, Rivkin described himself as a "liar, two-faced and having no boundaries." Rivkin admitted that his character in 1994 was "horrendous." Rivkin also testified that he definitely needed to rehabilitate his character because even his extended family did not want to associate with him.

Rivkin received counseling from Dr. Gene G. Abel, M.D., of the Behavioral Medicine Institute of Atlanta, Georgia. Rivkin testified that he obtained special permission from the court to attend counseling with Dr. Abel in Atlanta, Georgia. On May 10, 1999, Dr. Abel wrote a letter to Andy Doyle, Rivkin's probation officer. Dr. Abel wrote that he had counseled Rivkin since March 24, 1997, and that they had over 160 sessions of treatment. Dr. Abel also wrote that "Rivkin has made exceptional progress." Dr. Abel also wrote that "I have repeatedly been evaluating his risk to re-offend, and I continue to find him not to be at risk to re-offend."

On February 20, 2000, Dr. Abel wrote another letter to Andy Doyle, stating that he believed that Rivkin, in his opinion "poses no risks to the community." In a letter to William Scherwenka, Rivkin's adult probation officer, Dr. Abel wrote "here is an update on my ongoing supervision of Joe Rivkin. Mr. Rivkin continues to do well." And on January 30, 2002, Dr. Abel wrote another letter to Mr. Scherwenka to update him on Rivkin's progress. On July 5, 2000, Rivkin was eventually removed from sex offender probation to standard probation, however, the terms and conditions of the sex offender probation remained in full force, including the conditions relating to contact with children 17 and younger, other terms were modified.

Mr. Rivkin testified that he is now a better person. He also testified that he takes full responsibility for his inappropriate behavior in 1994. In addition, he has three therapists that he

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can contact if he needs assistance. Rivkin also testified that he will continue with his therapy even if the Department approves the Petitioner's Application. During his testimony, Rivkin stated that he attends Alcoholics Anonymous on a regular basis, and sobriety is a lifelong commitment.

Mr. Marty Soto, Mr. Michael Kimerer, and Ms. Judy Hudson each testified at the Hearing. Mr. Soto is Division Director with the Maricopa County Adult Probation Office. Mr. Soto conceded that Rivkin is probably not a pedophile, but he expressed concern that Rivkin may experience a relapse because he will no longer be monitored by the Maricopa County Adult Probation Office. Mr. Soto also testified that the Maricopa County Adult Probation Office will no longer be able to impose strict boundaries on Rivkin's behavior and only a short time has passed since Rivkin has been unsupervised. Soto is also concerned about Rivkin's addictive personality as it relates to Rivkin's feelings of failure in the past and how that relates to relapse studies. He further testified that Rivkin's impatient edge created a concern for relapse.

Mr. Kimerer is a criminal defense attorney. He testified that Rivkin is now a better and wiser person. He also testified that Rivkin is one of two success stories that he has experienced during his criminal law career.

Ms. Judy Hudson also testified. Ms. Hudson is the Assistant Superintendent of Banks. She testified that the Department denied Rivkin's application because of Rivkin's felony conviction and poor character. Ms. Hudson testified that Rivkin committed an egregious offense when he had sexual relations with the 14 year in 1994. Ms. Hudson also testified that Rivkin's inappropriate behavior shows bad character, as well as his cocaine problem. Ms. Hudson added in her testimony that an insufficient amount of time has not elapsed to determine if Rivkin has rehabilitated his character. She also expressed concern that Rivkin may experience a relapse because he will no longer be monitored by the Maricopa County Adult Probation Office. In addition, the Probation Office can no longer impose strict boundaries on Rivkin's behavior. Hudson consulted with the Department's legal counsel and her supervisor, before making a determination regarding the application. Ms. Hudson testified that Rivkin must prove that he is a law abiding citizen (during difficult stressful situations) absent the supervision of the Maricopa County Adult Probation office. In Ms. Hudson's testimony she stated that the Department should wait five years before granting the Petitioner's application. Ms. Hudson explained that five years is an appropriate amount of time to determine if Rivkin will remain a law abiding citizen. She conceded that five years is a personal benchmark.

On May 9, 2002, the ASBD through Administrative Law Judge Casey J. Newcomb (ALJ), issued a Recommended Decision. The recommendation was that Rivkin be issued a one year provisional commercial mortgage banker license as long as he comply with the following five conditions: (1) submit to random polygraph testing; submit to random drug testing; attend Alcoholics and/or Narcotics Anonymous; attend drug and sexual offender therapy; and obey all state and federal laws. The ALJ based his decisions on some of the factors and changes in Mr. Rivkin's probation, the timing of the felony, therapy, and other facts.

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On May 17, 2002, the ASBD through Superintendent Richard C. Houseworth, issued a Final Administrative Decision denying the license.

Rivkin now seeks review of that decision. He raises three issues for review. The first issue is whether the Superintendent Houseworth's modification of the ALJ's conclusion of law and the subsequent rejection of the ALJ's recommended decision constitute an abuse of discretion, and is arbitrary and capricious. Second, whether the Arizona State Banking Department's denial of Mr. Rivkin's license was supported by any substantial evidence. Third, whether the ASBD presented any evidence that Rivkin's conviction and qualification for early release of lifetime probation showed any reasonable relationship to the function of employment or occupation for which the license is sought.

### **3. Discussion**

#### **(a) Was the ASBD's modification of the ALJ's Decision and the Superintendent's Final Administrative Decision arbitrary, capricious, or and abuse of discretion?**

Under the Administrative Review Act, the Superior Court decides only whether the decision was illegal, arbitrary, capricious or an abuse of discretion.<sup>4</sup> In determining whether an administrative agency has acted arbitrarily or capriciously and therefore abused its discretion, a review of the record must show that there has been unreasoning action, without consideration and disregard for the facts and circumstances.<sup>5</sup> Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.<sup>6</sup>

Rivkin contends that the Superintendent's decision to reject the ALJ's recommendation and deny his application is arbitrary, capricious, and an abuse of discretion, particularly since the determinations made by the ALJ were based on exhaustive hearings and a presentation of substantial evidence to support the ruling. Rivkin further argues that the ALJ's recommendation supports the ALJ's conclusion that he has made considerable efforts to rehabilitate his conduct through therapy and medical treatment.

ASBD disagrees and offers two reasons in support of its positions. First, the denial of the initial application and rejection of the Recommended Decision are not arbitrary, capricious and an abuse of discretion. In the initial denial, Judy Hudson stated during her testimony that she considered multiple sources of information: Rivkin's application, personal history, the Department's database, prior applications, prior actions by the ASBD and other paper work in the file.<sup>7</sup> Despite that Rivkin's civil rights were restored, this did not occur until four months after he

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<sup>4</sup> Brodsky v. City of Phoenix Police Dept. Retirement System Bd., 183 Ariz. 92, 900 P.2d 1228 (Ariz. App. 1995).

<sup>5</sup> Petras v. Arizona State Liquor Bd., 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (Ariz. Ct. App. 1981) quoting Tucson Public Schools, District No. 1 Pima County v. Green, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972).

<sup>6</sup> Id.

<sup>7</sup> Defendant (ASBD)'s Memo, line 16-21, p. 19.

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submitted his license application. Reviewing all the information the ASBD had sufficient grounds to deny Rivkin's application based on the felony conviction and evidence concluding that Rivkin did not possess the requisite good character. Second, ASBD contends that the Superintendent's Final Decision is not arbitrary, capricious or an abuse of discretion. Arizona Revised Statute Section 41-102(B), gives the head of the agency the authority to "accept, reject or modify..." a decision. Moreover, the head of an agency **may** review a decision and he or she would be well within his or her authority to decline review.<sup>8</sup> Since the head of the agency does not have to follow the ALJ's **Recommended** Decision the Superintendent's rejection does not rise to the level of arbitrary, capricious or an abuse of discretion, even though it may be believed that an erroneous conclusion has been reached.

Rivkin responded by claiming that a license is a right and not a privilege and cites to Schillerstrom v. State.<sup>9</sup> In Schillerstrom, the Court of Appeals addressed the issue of whether revoking a chiropractor's license offended due process as an excessive punishment. In that case, Schillerstrom held a chiropractor's license but failed to notify the Chiropractic Board that he had been arrested when he submitted an application for renewal of his license. The Board revoked his license based on the falsified application and conviction. The Court states that "for those who are qualified, the practice of a profession is a right, not just a privilege," and "... the State's interest may justify the degree of infringement which ensues from the sanction, and appropriate procedures must be used to guard against arbitrary action."<sup>10</sup>

Here, unlike in Schillerstrom, Rivkin does not have a license and has not been found to be "among those who are qualified." Unlike Schillerstrom, Rivkin was given due process. His application was reviewed by the department and when it was denied, Rivkin had a hearing before an ALJ to address the issues. Despite the outcome, which Rivkin dislikes, he was not denied due process.

**(b) Was the ASBD's denial of the license supported by substantial evidence?**

Rivkin asserts that the "ASBD did not present any rebuttal evidence to his overwhelming evidence and could not meet its legal standard to support its position."<sup>11</sup>

There is no requirement that a party must rebut any and all evidence. Moreover, the plaintiff bears the burden of proof. However, there is a test to determine whether a decision is supported by substantial evidence, as articulated in Schillerstrom v. State.<sup>12</sup> In Schillerstrom, the Court of Appeals stated that "in reviewing an administrative action the (Superior) court may not reweigh the evidence in order to resolve perceived conflicts. Rather, in order to reverse the agency's decision, the (Superior) court **must find that there was no substantial evidence to**

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<sup>8</sup> A.R.S. § 41-1092.08(B).

<sup>9</sup> 180 Ariz. 468, 885 P.2d 156 (App. 1994).

<sup>10</sup> Id., 180 Ariz. at 471, 885 P.2d at 159.

<sup>11</sup> Opening Brief, p. 27.

<sup>12</sup> Supra.

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support the agency decision."<sup>13</sup> Substantial evidence exists to support an administrative decision even if there are two inconsistent factual conclusions that can be supported by the record and one decision is elected.<sup>14</sup>

The ASBD claims that the evidence in this case leads to the conclusion that a license should not be issued. The ASBD states that while Rivkin believes that the ALJ's recommendation unequivocally suggest the granting of a license, it speaks to the contrary. First, the ASBD contends that after hearing the evidence, the ALJ did not conclude that Rivkin or Financial Associates merited a license from the Department without qualifications. Instead, the ALJ concluded that Rivkin merited only a one year provisional license with at least five conditions attached. The conditions mentioned earlier in this opinion are not an unequivocal endorsement that Rivkin has been found to be a person of honesty, truthfulness and good character - characteristics that must be present or a license can be denied.<sup>15</sup>

As required under Schillerstrom this Court must find that there was no substantial evidence to support the agency decision in order to reverse it. That is not the case. Mr. Soto, testified that he believed Rivkin might not be able to handle the pressures and relapse. There was also testimony from Ms. Hudson who testified that a relapse could create a public safety concern and pose liability to the Department. Additionally, Rivkin's witnesses' testimony, that of Dr. Abel and Mr. Kimerer, both concluded that the Rivkin is getting better, but neither directly stated that he is of good character. Dr. Abel states that Mr. Rivkin may not re-offend, that he "has made exceptional progress", and based upon his evaluation of Rivkin..."believe[s] that he poses no risk to the community."

There is no dispute on either side that Rivkin is working hard at improving his character. What is at issue is whether Rivkin qualifies as having good character at this time to merit a broker's license.

Rivkin argues that substantial evidence exists as to why he should be granted a license and that he is of good moral character. First, he believes that the age of the felony should be considered a mitigating factor. Under the ASBD there is no set policy that triggers a granting of a license after a certain period of time has elapsed. The Department must be able to consider each felony conviction and release from probation on a case by case basis. While this Court acknowledges Rivkin's belief that sufficient time has passed and he has done well, it is simply not enough to grant a license. Especially, as stated elsewhere in this opinion, he has been under the supervision and scrutiny from the Adult Probation Office and under the care of therapists. The test of his character will come when he will be left alone to face the challenges and obstacles that befall him. Additionally, Mr. Rivkin conceded in his own testimony that he was not a person of "good character." His contention that he is a better person today and takes

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<sup>13</sup> Id., 180 Ariz. at 471, 885 P.2d at 159.

<sup>14</sup> Webster v. State Board of Regents, 123 Ariz. 363, 365, 599 P.2d 816, 818 (App. 1979).

<sup>15</sup> A.R.S. § 6-982(A)(2).

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responsibility for his inappropriate behavior must be followed up with action to demonstrate that he really is of "good character". However, this Court is not necessarily of the opinion as is Ms. Hudson that five (5) years is the magical time to wait for evidence of a good character to appear. The decision to grant a license should come when the Plaintiff has proven that he is of good character and free from supervision.

As to the issue that the ASBD should grant the provisional license and act as a Probation Office for Rivkin, this Court believes that this is outside the scope of the Department.

Rivkin argues that Cracchiolo v. State<sup>17</sup>, authorizes the exercise of powers not expressly granted. Cracchiolo, is not analogous to the facts of this case as claimed by Rivkin. The issue there involved the State taking land because there was a critical need for the water a facility to avoid potential health problems. In that case, the taking was well within the broad authority of the DHS to protect the health of the people of the state and there was no specific authority for an institutional lease of school trust lands to be used the manner described. The Court said that these facts are unique and it believed that the legislature implicitly authorized such action in these statutes and A.R.S. § 37-441.<sup>18</sup> In the instant case, there is no issue of public safety that would require the ABDS to take on the role of Probation Officer so that Mr. Rivkin can obtain a mortgage license.

**(c) Do Rivkin's convictions and drug usage bear a reasonable relation to his job function as a mortgage banker?**

Rivkin asserts that the ASBD did not show that his convictions bear a reasonable relation to his ability to perform his job function as a mortgage banker. While sex crimes are clearly crimes of moral turpitude, there must be a nexus between the criminal conduct and the functions of the profession. Rivkin contends that there is no nexus between his 1995 conviction for attempted sexual contact with a minor and the functions of being a commercial banker. These arguments are without merit.

Rivkin's admitted prior sex crime and drug use give legitimate concern that a relapse could severely hinder his ability to perform his functions as a commercial banker. A banker's role is a critical one within our society, particularly because it is the backbone of the American economy. Since the Arizona legislature has established a relationship between having a good character and holding a commercial banking license, Rivkin's sexual behaviors and drug use bring his character into question. Until Rivkin can establish his good character, free of supervision, this court finds that he has not met the requirements for obtaining and holding a commercial banking license.

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<sup>17</sup> 146 Ariz. 452, 457, 706 P.2d 1219, 1224 (App. 1985).

<sup>18</sup> Id.

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**4. Conclusion**

The Superintendent's Final Administrative Decision is clearly supported by substantial evidence, and is not contrary to law or arbitrary or capricious.

IT IS THEREFORE ORDERED denying all relief requested by Plaintiff Rivkin.

IT IS FURTHER ORDERED that counsel for ASBD lodge an order consistent with this minute entry by April 16, 2003.